

2005)(proposed amendment of legal malpractice action to allege conflict of interest denied on grounds of futility); *Resolution Trust Corp. v. Gold*, 30 F.3d 251, 253 (1st Cir. 1994).

The allegations of the Trustee’s proposed Amended Complaint are not “solidly grounded in the record” or “supported by substantial evidence.” They are also untimely, and the apparently strategic delay has prejudiced EBG.

PROCEDURAL BACKGROUND

This case was filed in December 2003 and transferred from the Northern District of California in November 2004. In June 2005, this Court entered the parties’ agreed-upon Scheduling Order, which called for completion of discovery by December 2005. When the Trustee informed EBG that he would not be able even to finish reviewing his own documents by December 2005, EBG proposed, and the parties thereafter sought, an amended Scheduling Order, which extended the deadlines and also introduced phased discovery.

The Amended Scheduling Order, which the Court entered in November 2005, divided discovery into two phases. Phase I covered all liability issues except the technical question whether the catalytic extraction processing (“CEP”) technology at issue in the case in fact worked.¹ Phase II

1 According to the Amended Scheduling Order, Phase I discovery included:

- a. The acquisition of assets of MMT from the MMT bankruptcy estate;
- b. Negotiations preceding such acquisition, including negotiations between ATG and Quantum Catalytics and negotiations between ATG/Quantum Catalytics and the MMT Trustee, including, but not limited to:
 - i. statements made by all parties and any third parties about the proposed acquisition, the assets to be acquired, or the technology;
 - ii. due diligence relative to the proposed acquisition;
 - iii. relationship between ATG and MMT and ATG familiarity with CEP and Q-CEP prior to MMT bankruptcy;
 - iv. information available publicly with respect to MMT, its assets, or its technology;

would cover technical issues with respect to the CEP technology and all damages issues. The Amended Scheduling Order contemplated motions for summary judgment on EBG's liability to the Trustee for legal malpractice at the close of Phase I discovery. Phase II discovery, if necessary, would take place after the Court's ruling on summary judgment motions.

The Trustee made Phase I documents available to EBG pursuant to the Amended Scheduling Order during March and April 2006 (responding to document requests served on the Trustee in June 2005). During April 2006, the Trustee took six depositions, while EBG took three (one of EBG's depositions, Carole Schwartz Rendon's, was postponed until early May 2006 owing to a personal emergency suffered by the witness). In each of the nine depositions, the Trustee's questions focused upon as-yet unasserted allegations of conflict of interest that have only now been included in the proposed Amended Complaint.² The Trustee appears to have waited deliberately until discovery had closed and EBG's summary judgment motion was filed to move to amend his Complaint.

Immediately after the completion of Ms. Rendon's deposition, on May 9, 2006, EBG sent the Trustee a letter, noting that the factual allegations of the original Complaint (most of which had been made "upon information and belief") were no longer viable given the facts developed during

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- c. EBG's representation of ATG in connection with such acquisition, including the commencement and scope of that representation, the work performed, and communications between EBG and ATG;
 - d. EBG's representation of MMT and/or its employees in any context through the date of closing of such acquisition, the commencement and scope of those representations, the work performed, and communications between EBG and MMT and/or its employees (subject to any restrictions imposed by the attorney-client privilege);
 - e. Facts alleged by plaintiff to establish (1) duty on the part of Individual Defendants, and (2) breach of that duty, with respect to claims of negligent misrepresentation; and
 - f. The extent of EBG's disclosures and/or communications to ATG regarding EBG's representation of MMT and/or its employees.

² Contrary to the claim made in his motion to amend, the Trustee did not "discover" his amended claims during deposition discovery in this matter. In fact, no witness with personal knowledge of these claims testified favorably to the Trustee's position.

discovery in this matter and asking the Trustee to withdraw his Complaint. The Trustee responded with a letter in which he acknowledged that his initial view of the facts had been disproved and claiming that he would amend his complaint. However, he waited over a month to do so, until after the deadline for filing motions for summary judgment; accordingly, EBG was forced to move for summary judgment on the original Complaint.³

Finally, almost two months after the close of Phase I discovery and two weeks after EBG filed its summary judgment motion, the Trustee has moved to amend his Complaint. The proposed Amended Complaint incorporates an entirely new view of EBG's alleged malpractice: an alleged failure to disclose a series of conflicts of interest. It fails to correct certain fundamental factual errors from the original Complaint while introducing new, erroneous factual allegations that are not "solidly grounded in the record." Significantly, it does not cure the most glaring deficiency of the original Complaint: a lack of causation between the malpractice alleged and any damages. Nor do the new allegations of malpractice -- alleged failures to disclose conflicts of interest -- survive scrutiny.

ARGUMENT

I. AMENDMENT IS FUTILE BECAUSE THE TRUSTEE HAS NOT CURED THE CENTRAL SHORTCOMING OF HIS INITIAL COMPLAINT – AN UTTER LACK OF CAUSATION.

The first and most basic reason why amendment is futile is that the Trustee's proposed Amended Complaint has not cured the most significant shortcoming of his initial Complaint. There is a fundamental and fatal lack of causation between the malpractice alleged and any damage alleged to have been suffered by ATG or ATG Catalytics. "The existence of a conflict without proof of

³ When the motion to amend was not forthcoming, EBG reasonably concluded, based on the record and applicable law, that the Trustee had decided against amending his Complaint.

causally-related damages is insufficient.” *Robinson v. Bodoff*, 382 F.Supp.2d 229, 234 (D. Mass. 2005)(denying motion to amend legal malpractice complaint to assert conflict of interest). *See also McCann v. Davis, Malm & D’Agostine*, 423 Mass. 558, 559 (1996); *Van Brode Group, Inc. v. Bowditch & Dewey, Inc.*, 36 Mass. App. Ct. 509, 514 (1994).

A. Neither A Failure To Disclose That CEP Technology Did Not Work In the Past Nor that It Would Not Work In The Future Could Have Caused ATG's Alleged Damages.

In his original Complaint, the Trustee claimed that EBG failed to disclose that it had learned from various sources (Department of Energy investigators, Earl McConchie, class action plaintiffs) that the CEP technology had not worked in the past. As discussed in EBG's summary judgment submission, it is undisputed that, in November 1998, ATG already knew that the CEP technology had not worked in the past, and thus any alleged failure to disclose did not cause ATG's alleged damages. *See* Memorandum in Support of Motion of Defendant Epstein Becker & Green, P.C. for Summary Judgment (“EBG Mem. SJ”) at 15-18. In his proposed Amended Complaint, the Trustee seeks to evade this problem by adding a second, subtly different take on what EBG allegedly failed to disclose. Now, the Trustee also alleges that ATG did not know that Quantum Catalytics was not telling the truth when it told ATG that the CEP technology would work in the future:

During the negotiations between ATG and Preston, Nagel and Quantum, Preston and Nagel informed and assured ATG that technical issues with the CEP process had been worked out. Consequently, although ATG realized that MMT had lost money on the CEP/Q-CEP business, ATG negotiated a transaction with Quantum to jointly bid on assets of MMT.

Amended Complaint (Proposed) ¶ 45.

This revised allegation does not cure the problem with causation in the Trustee's case. First and foremost, the undisputed facts of record are that ATG did not rely on the claims of Quantum Catalytics in making its acquisition decision at all but rather took all of these representations with a grain of salt.

It was known to ATG at the time of the transaction that the CEP technology had not operated reliably. As explained above, ATG approached the acquisition of the MMT CEP assets with a back-up plan due to the risk it perceived with the CEP process. If CEP had operated as promised by Quantum Catalytics (which ATG was skeptical of), it would have been an upside. If it did not, ATG's plan was to remove the CEP processors from the facility and replace that process with a process that had already been internally proven to treat resins.

Hewitt Affidavit ¶ 15(b). *See also id.* ¶ 10 (“Despite assurances by Drs. Preston and Nagel that the technical issues with the CEP process had been worked out, ATG considered the CEP process to pose a risk.”).

B. The Court Must Consider The Overall Improbability Of The Trustee's New Damages Scenario.

Moreover, in ruling on the Trustee's motion to amend, the Court must put into context the utterly improbable set of facts upon which the Trustee's malpractice claim now rests. The Trustee's causation argument now relies upon the contention that Quantum Catalytics was lying to ATG in order to induce ATG to invest alongside it in technology that was neither safe, nor operable, nor commercially viable. Yet the undisputed fact that the Trustee seeks to mask through his deficient pleading is that Quantum Catalytics had no incentive to indulge in this conduct. Quantum Catalytics' owners were Christopher Nagel and John Preston, who were, respectively, former Chief Technology Officer of MMT and inventor of the technology and a former outside director. They were not *selling* the technology to ATG but rather were *purchasing it* jointly with ATG. ATG and Quantum Catalytics were both members of ATG Catalytics, the entity formed to acquire the Q-CEP assets. Kellogg Affidavit ¶ 5.⁴ Moreover, under the terms of the asset acquisition, Quantum Catalytics and ATG Catalytics, each of which purchased a different set of CEP assets, were jointly

⁴ The ownership of ATG Catalytics in December 1998 is objectively verifiable. Moreover, the Trustee acts as a fiduciary for this company. There is no excuse for the Trustee to continue to allege, erroneously, in his proposed Amended Complaint that ATG Catalytics was a wholly-owned subsidiary of ATG, Inc. *See* Amended Complaint (Proposed), ¶ 6. It must be inferred that the Trustee did not wish the Court to know that, in fact, Quantum Catalytics owned ten percent of ATG Catalytics, as this is flatly inconsistent with his theory of this case.

and severally liable for the entire purchase price of the aggregated CEP assets.⁵ Kellogg Affidavit ¶¶

5. It simply made no business sense for Quantum Catalytics to participate in this transaction if it thought the assets being purchased by ATG Catalytics were unsafe, ineffective, or non-operational.⁶

C. Even If The Trustee's Conflicts Argument Were Factually Coherent, It Could Not In Any Event Have Resulted In Damage To ATG.

Causation fails for yet another reason. Even assuming that EBG had a conflict of interest in December 1998 that required disclosure to ATG (which it did not, *see infra* Part II), the Trustee's claim of legal malpractice would nonetheless fail as a matter of law because the Trustee is unable to show that such an ethical violation could have caused any damages.

The Trustee alleges that, owing to EBG's failure to disclose its conflict, ATG never learned certain information about the CEP technology and its role in the federal campaign finance and government contracts investigations, the MMT shareholder litigation, and Earl McConchie's demand letter. Yet, if EBG had disclosed the any of the alleged conflicts, ATG might have done either of two things: it might have waived the conflict and continued to use EBG, or it might have gone to a different lawyer. In either case, the result would have been the same: ATG would not have learned any of the allegedly "non-public" information that it has claimed EBG failed to disclose.

There is no allegation in this case that the quality of EBG's representation of ATG was less

⁵ Indeed, when ATG Catalytics failed to make its second payment for the Q-CEP assets, due on December 1, 2000, the MMT Trustee first sued Quantum Catalytics, alone, for payment. *Gray, Chapter 11 Trustee of Molten Metal Technology, Inc. v. Quantum Catalytics LLC*, Adversary Proceeding No. 01-1205-CJK (Bankr. D. Mass.). This lawsuit put Quantum Catalytics out of business. Only after this case settled did the MMT Trustee pursue ATG Catalytics, in state court in Tennessee.

⁶ The much more probable story is the one that is undisputed in the record of the case. Bill Hewitt, who negotiated the asset purchase transaction for ATG, testified that Quantum Catalytics wanted to purchase all of the CEP Assets but was unable to do so because the State of Tennessee would not transfer the nuclear operating license to an inexperienced firm and demanded that ATG acquire the Bear Creek facility and hold the license. Hewitt Affidavit ¶¶ 11-12.

than uniformly excellent, and therefore, ATG cannot demonstrate that it was damaged by its continued retention of EBG. Proposed amendment of this legal malpractice claim to include allegations of conflict of interest would therefore be futile, for the same reason explained by this Court in *Robinson v. Bodoff*, when confronted with a request to amend a legal malpractice complaint to allege a conflict of interest:

It is insufficient for the plaintiff to allege that, had the alleged conflict of interest been disclosed, he would have hired another attorney because there is no allegation that the result would have been any different. Accordingly, for all of the articulated reasons, plaintiff's motion for leave to amend will be denied.

Robinson v. Bodoff, 392 F. Supp.2d at 234.

II. AMENDMENT IS FUTILE BECAUSE THE TRUSTEE CANNOT SHOW SUBSTANTIAL SUPPORT IN THE RECORD FOR EITHER HIS OLD OR HIS NEW ALLEGATIONS OF MALPRACTICE.

The Trustee's initial Complaint alleged that EBG did not disclose to ATG information in its possession that was material to its representation of ATG. EBG moved for summary judgment on this Complaint arguing that (a) it indisputably did not possess the information the Trustee claimed it did; (b) the information it did possess was not as a matter of law material to its later representation of ATG; and (c) none of these alleged failures to disclose in any event caused any damage to ATG. *See* EBG Mem. SJ at 1-2. The proposed Amended Complaint retains the allegations of non-disclosure of allegedly material information, *see* Amended Complaint (Proposed) ¶¶ 66(d), (e), (f), (g), without curing their defects, which were comprehensively set forth in EBG's summary judgment motion.⁷ It also adds allegations with respect to various alleged conflicts of interest, *see id.* ¶¶ 66(a), (b), (c), (h),⁸ which are not supported by the record.

⁷ With respect to the allegation that EBG possessed material information concerning the viability of CEP technology as a result of its representation of MMT employees in the Federal Investigations, *see* EBG Mem. SJ at 8-9. With respect to the allegation that EBG possessed material information concerning the viability of CEP technology from an involvement in the MMT Litigation, *see id.* at 4-5, 10-12. With respect to the allegation that EBG possessed material information concerning the viability of CEP technology as a result of its brief exposure to the McConchie Letter, *see id.*

A. Failure To Disclose Prior Representation of MMT.

The first new claim is that EBG breached a duty owed to ATG when it failed to disclose to ATG that “it had provided direct legal representation to MMT in the Federal Investigation.” Amended Complaint (Proposed), ¶ 66(b). This new factual allegation lacks any support in the record of this case. The record of this case, following full discovery, is clear that EBG represented a number of MMT employees who were interviewed, produced documents, or (in one case) testified before a grand jury in the investigations of MMT pursued in tandem by the Campaign Finance Strike Force of the United States Department of Justice and the Office of the Inspector General of the United States Department of Energy. In addition, EBG also represented MMT employee

at 5-6, 12-14.

⁸ Paragraph 66 of the proposed Amended Complaint provides a comprehensive list of information and purported conflicts of interest that EBG allegedly failed to disclose:

EBG breached its duty to ATG when it failed, prior to undertaking its representation of ATG in connection with ATG’s joint bid and purchase of MMT assets, to adequately disclose that:

- (a) EBG had participated in a joint defense agreement in connection with the Federal Investigations and in the MMT Litigation;
- (b) EBG had provided direct legal representation to MMT in the Federal Investigations;
- (c) EBG was representing Nagel in the MMT Litigation.
- (d) among the issues raised in both the Federal Investigations and the MMT Litigation were whether there were serious problems with MMT’s CEP/Q-CEP technology;
- (e) among the issues raised in the Federal Investigations and the MMT Litigation, were the honest and credibility of MMT officers and directors, including Preston and Nagel;
- (f) McConchie had outlined, in the McConchie Letter, his specific claims regarding serious defects with MMT’s CEP/Q-CEP technology and related assets;
- (g) McConchie alleged, in the McConchie Letter, matters going to the honesty and credibility of, among others, Nagel; and
- (h) EBG possessed a pecuniary interest in MMT’s bankruptcy estate, as evidenced by its Proof of Claim.

Amended Complaint (Proposed), ¶ 66.

Christopher Nagel in preparation for testimony before the House Commerce Committee, which was investigating the letting of government contracts to MMT. These MMT employees had indemnification agreements with MMT pursuant to which MMT agreed to pay their legal fees in connection with these federal investigations, and EBG invoiced MMT for the legal services it rendered to the employees. EBG did not, however, represent MMT itself.

These facts are supported by the testimony of each witness in a position to know, including Carole Schwartz Rendon, the EBG attorney who the Trustee alleges provided the legal services to MMT, and Ethan Jacks and Eugene Berman, former inside counsel to MMT. *See* Rendon Dep. at 9-10; 12-18 (Ex. A hereto); Berman Dep. at 21-24 (Ex. B hereto); Jacks Dep. at 16-17, 20-21 (Ex. C hereto).

The Trustee has alleged in his proposed Amended Complaint that an attorney-client relationship between EBG and MMT is implied by reason of MMT having sought and EBG having in fact provided legal advice. *See* Amended Complaint (Proposed) ¶ 28. At this point in the case – after full discovery on this Phase I issue, this new allegation must be assessed in light of the facts of record in this case -- not the mere possibility that the Trustee might some day develop some facts in discovery. The proposed amendment is futile because the record will not bear the inference that EBG offered legal advice to MMT or that MMT relied upon EBG for the same. In fact, the undisputed facts with respect to the circumstances of EBG's engagement to represent MMT employees clearly suggest otherwise. Moreover, while the record reflects communications between EBG attorney Carole Schwartz Rendon and MMT's in-house and outside lawyers, the undisputed testimony is that these discussions were limited to logistical issues, such as scheduling and budget. Jacks Dep. at 69; Berman Dep. at 45-47; Rendon Dep. at 47-48. Ms. Rendon also testified that there were limited discussions with respect to the coordination of the prepared statements of Christopher

Nagel and other MMT officers to the House Commerce Committee. Rendon Dep. at 51-52. The record does not support the conclusion that MMT sought legal advice and EBG either provided that advice or caused MMT to believe that such advice would be forthcoming. *See, e.g., DeVaux v. American Home Assurance Co.*, 387 Mass. 814 (1983).⁹

Finally, even if somehow it were determined that an attorney-client relationship had been formed between EBG and MMT during the late 1997 through early 1998 time frame, this would not have created an obligation to disclose that former attorney-client relationship to ATG in November 1998. Rule 1.9 of the Massachusetts Rules of Professional Conduct governs an attorney's obligation to disclose prior representations to a new client. It provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Mass. Rule of Professional Conduct 1.9(a). Even assuming that the two matters (federal investigations of MMT campaign finance and government contracting procedures, on the one hand, and an acquisition of certain assets from a bankruptcy estate, on the other hand) were "substantially related" for purposes of Rule 1.9 – which is to be doubted -- the disclosure obligation runs solely to the former client, whose client confidences could be perceived to be at risk, and not to the new client. There would have been no obligation to make any disclosure to ATG, and any cause of action that might arise out of a violation of the rule would belong to the MMT Trustee, not ATG.

⁹ The Trustee may point to a memorandum in which Ms. Rendon summarized for MMT's in-house and outside counsel the questions the FBI and OIG were asking the MMT employees. Ms. Rendon provided this information to MMT with her clients' permission and because she believed it was in her clients' best interests to do so. Rendon Dep. at 21-22. In one paragraph, Ms. Rendon highlights what she thought might be areas of concern for MMT. This paragraph of informal observations is not legal advice, and, within the context of Ms. Rendon's representation of the MMT employees, insufficient to create reasonable reliance by MMT. The record lacks evidence that MMT requested or relied upon what Ms. Rendon wrote or upon EBG, generally, to provide it legal advice. *See* Berman Dep. at 32-39; Jacks Dep. at 41-47.

B. Failure To Disclose Representation Of Nagel In MMT Litigation.

The Trustee has also added the new claim that EBG breached a duty owed to ATG when it failed to disclose to ATG that it had represented Christopher Nagel in the MMT Litigation. It is, however, undisputed that EBG did not commence its representation of Christopher Nagel in the MMT Litigation until after the ATG asset acquisition closed on December 1, 1998. *See* EBG Mem. SJ at 10-12.

In November 1998, when EBG undertook to represent ATG in connection with the asset acquisition, it did not represent Christopher Nagel. Mr. Nagel was at that time a former client, as EBG's former representation of him in Congressional testimony had ended. It was as a former client that EBG sought and obtained a waiver of any conflict of interest that might arise as a result of its prior representation of him. Because he was a former client, there was no obligation to disclose his identity to ATG, the firm's current client.¹⁰

Again, in this procedural posture (full Phase I discovery is complete on EBG's representation of Dr. Nagel prior to December 1, 1998), the Court must assess whether proof of this allegation is "solidly grounded in the record." The record reflects that EBG attorney Michael Tuteur first met with Christopher Nagel on December 1, 1998 and did not commence representing Dr. Nagel in the MMT shareholder litigation until a few days afterwards, when (a) Dr. Nagel had asked EBG to undertake the representation and (b) MMT's directors' and officers' liability insurance carrier approved EBG as counsel to Dr. Nagel. Tuteur Dep. at 23-26 (Ex. D hereto). Mr. Tuteur's

¹⁰ It is not uncommon and often prudent to make disclosures in situations not required by the ethical rules, and, accordingly, EBG in fact notified Bill Hewitt of ATG that Christopher Nagel, an investor in Quantum Catalytics, had been a client of the firm. Weckstein Dep. at 54 and Ex. 11 (Exs. E hereto).

testimony is corroborated by EBG's billing records, which reflect no time billed to Mr. Nagel's defense in the MMT shareholder litigation until December 1, 1998.¹¹

C. Failure to Disclose Participation in Joint Defense Agreements.

The Trustee also claims that EBG breached its duty when it failed to disclose that it had participated in joint defense agreements in connection with both the federal investigations and the MMT Litigation. As with the other new allegations, the Court must assess whether this new claim finds substantial support in the record. There is no question that the record does not support the claim that EBG was party to a joint defense agreement in either matter.

With respect to the federal investigations, Ms. Rendon testified unequivocally that EBG was not party to a joint defense agreement in the federal investigations, Rendon Dep. at 21-22, 52-57, and there was no testimony to the contrary, see Berman Dep. at 30-31; Tuteur Dep. at 16-17; Jacks Dep. at 33-34. Ms. Rendon's explanation of the reasons why her employee clients were not parties to the joint defense agreement is sensible and consistent with the facts of record:

I believe that there were instances where my clients and MMT had common interests in connection with the investigation, which is why in some instances I felt comfortable sharing information with MMT, but no, I didn't believe that we were all similarly situated sufficiently that it would have made sense or been appropriate for my clients to be part of a joint defense agreement. For starters, none of my clients were either subjects or targets of the investigation. That from a very immediate standpoint put them in a different position than many of the other players.

¹¹ The Trustee may seek to rely on an email written by Mr. Tuteur in November 1998, in response to a conflicts inquiry generated by EBG's undertaking to represent ATG in the asset acquisition. Mr. Tuteur responded to an inquiry about the status of EBG's representation of former MMT employees with the comment that he "continued" to represent Dr. Nagel in shareholder litigation, although he had in fact not yet represented Dr. Nagel at all. Mr. Tuteur explained that he had phrased the memorandum that way because he had already had discussions with Carole Schwartz Rendon about possibly representing Dr. Nagel and had already received (from Ms. Rendon, who had moved to Ohio) two memoranda prepared by Bingham Dana LLP, counsel to all defendants in the MMT Litigation. Tuteur Dep. at 37-39. As he had engaged in preliminary discussions about the possibility of representing Dr. Nagel (albeit with Ms. Rendon, not with Dr. Nagel), Mr. Tuteur thought it prudent "to examine the question about whether the preliminary pre-representation status affected Epstein Becker's potential representation of ATG." *Id.* at 38. This memorandum, considered in light of Mr. Tuteur's explanation and the other compelling evidence that EBG did not commence representing Dr. Nagel in the MMT Litigation until after December 1, 1998, does not provide the "substantial evidence" of liability that the Trustee needs at this juncture.

Rendon Dep. at 55-56. *See Wellman v. Willis*, 400 Mass. 494, 499 (1987)(no joint defense between company and its employees when FTC investigation focused on owners and employees were not targets). The fact that Ms. Rendon, with her clients' permission, sent MMT's in-house and outside counsel a memorandum about the employee interviews does not evidence a joint defense agreement: Ms. Rendon testified that she sent the memorandum because MMT and its employees had "common interests" and sharing information was in her clients' best interests.

The allegation that EBG was party to a joint defense in the MMT Litigation prior to December 1, 1998 also finds no support in the record. Mr. Tuteur, who testified that he did not even represent Mr. Nagel until after the ATG asset transaction had closed, *see supra*, also testified that EBG was not party to a joint defense agreement with the other defendants in the MMT Litigation prior to the closing of the ATG asset acquisition on December 1, 1998, Tuteur Dep. at 38.

Even if EBG had engaged in a joint defense in either of these matters, that would not without more have created an attorney-client relationship between MMT and EBG. Moreover, as discussed above, any expectation of confidentiality that a joint defense may have created would have meant that the subsequent representation of ATG would need to be disclosed to MMT, *see* Massachusetts Rule of Professional Conduct 1.9, but would not have required any disclosure to ATG.

D. Failure to Disclose Pecuniary Interest in MMT Bankruptcy Estate.

Finally, the Trustee proposes to add the entirely new claim that EBG breached a duty owed to ATG when it failed to disclose that it had previously submitted a proof of claim in the MMT bankruptcy proceedings. The theory apparently is that, as a creditor in the MMT bankruptcy, EBG had a pecuniary interest in maximizing the amount the MMT Trustee received for the CEP assets.

This theory is no better grounded in the record of the case than those previously discussed. There is no evidence in the record that EBG's corporate attorney, Jarvis Kellogg, was aware that

there was a proof of claim filed in the MMT bankruptcy when he handled the ATG asset acquisition; indeed, he testified that he was not even aware of EBG's prior representation of the MMT employees until January or February 1999, Kellogg Dep. at 22-23 (Ex. F hereto). Nor is there any evidence that Mr. Kellogg's loyalties were not completely with ATG in his handling of the asset acquisition or, put another way, that anything would have occurred differently if there had not been a proof of claim on file in the MMT bankruptcy.

III. PLAINTIFF'S PROPOSED AMENDMENT IS NOT TIMELY AND THE APPARENTLY STRATEGIC DELAY HAS PREJUDICE EBG.

A substantial number of the facts that the Trustee has "corrected" in or added to his proposed Amended Complaint were at his disposal – had he only troubled to look at his own documents -- at the time he drafted his initial Complaint. (For instance, the Trustee has claimed that the documents "proving" EBG's participation in a joint defense were produced to him by the MMT Trustee in early April 1996. In fact, the Trustee produced those documents to EBG in late 1995.) Despite this delay, however, by the time depositions in this case commenced, in April 1996, the Trustee's focus had turned to issues of conflict of interest, and they dominated his questioning at the depositions in this matter. The Trustee was in a position to seek to amend his Complaint in this matter well before he did.¹² However, despite the imminence of the summary judgment deadline, and its knowledge that EBG was preparing a motion for summary judgment, the Trustee waited until two weeks *after* EBG filed and served its motion for summary judgment to move to amend his complaint.

There was no apparent reason for this delay, except perhaps a wish to review EBG's legal arguments on summary judgment before preparing an amended complaint. Allowing this late amendment will require EBG to submit an entirely new set of summary judgment papers, to address

¹² It does not appear that plaintiff waited (or needed to wait) until Carole Schwartz Rendon's deposition was completed before drafting the proposed Amended Complaint, as the allegations of the Complaint are at odds with

claims that the Trustee was in a position to assert much earlier. While not as important as the futility of the proposed amendments, this conscious tardiness and the unnecessary work it has caused EBG are factors the Court may consider in ruling on the motion to amend.

CONCLUSION

For all of the foregoing reasons, EBG requests that the Trustee's Motion to Amend Complaint be denied.

EPSTEIN BECKER & GREEN, P.C.

_____/s/ Marjorie Sommer Cooke_____
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Dated: July 7, 2006

CERTIFICATE OF SERVICE

I, Paula M. Bagger, hereby certify that service upon plaintiff's counsel was effected through the Court's CM/ECF system this 7th day of July 2006.

_____/s/ Paula M. Bagger_____
Paula M. Bagger

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

- - -
Robert I. Hanfling,)
Chapter 11 Trustee for)
ATG, Inc., and ATG)
Catalytics, LLC,)
)
 Plaintiffs,)
)
 vs.) Case No: 05-10077-RGS
)
Epstein, Becker & Green,)
P.C., et al.,)
)
 Defendants.)

- - -
Deposition of Carole Schwartz Rendon, a
witness, herein, called by the defendants for
direct examination pursuant to the Federal Rules of
Civil Procedure, taken before Constance Versagi,
Notary Public in and for the State of Ohio, at the
offices of Kushner & Rendon, 2680 BP Building,
Cleveland, Ohio on Tuesday, May 9, 2006, commencing
at 9:50 a.m.

1 was then contacted and I don't recall who the
2 exact contact was, to see if I would be
3 interested in representing to extent that the
4 employees wanted me to, certain of the
5 employees of Molten Metal Technology.

6 Q When you say you were contacted, that was by
7 somebody at Molten Metal Technology?

8 A I believe ultimately Karen may have called me
9 initially to see if I was available. Then
10 ultimately there was a discussion with
11 somebody I can't recall who at Molten Metal
12 Technology.

13 Q Did you know Karen Green from the U.S.
14 Attorney's office?

15 A Correct.

16 (Exhibit B
17 marked for identification.)

18 Q Placing before you, Miss Rendon, a document
19 marked as Exhibit B in this deposition, can
20 you identify that document?

21 A It is a letter that I sent to one of the
22 Molten Metal employees that I represented by
23 the name of James Howie, H-O-W-I-E, with at
24 least one attachment, although the letter of
25 reference says two attachments.

1 Q Did James Howie ultimately become a client of
2 yours?

3 A Yes, he did.

4 Q I call your attention to the second sentence
5 of the letter where it says the first -- I'll
6 read you the first two sentences. Enclosed
7 herein please find two important items. The
8 first is a letter addressed to you that
9 formally details your desire to retain
10 Epstein, Becker & Green, PC to represent you.

11 Is the document that is attached to the
12 first letter, is that the attachment that is
13 referenced in that second sentence?

14 A Yes.

15 Q What is that letter, that second letter?

16 A It is a retention agreement between James
17 Howie and Epstein, Becker & Green.

18 Q Did you send out more than one letter in the
19 form of Exhibit B?

20 A Yes, I'm fairly confident that every one of my
21 clients received a letter that looked very
22 similar to Exhibit B, if not identical,
23 particularly the retention agreement portion.

24 (Exhibit C
25 Marked for identification.)

1 with respect to this draft memorandum?

2 A Because I was going to be providing
3 information to the lawyers representing other
4 individuals and other parties.

5 Q Did you in fact receive the authorization then
6 from each client from whom you requested
7 authorization?

8 A Yes, I did.

9 Q Do you recall whether any of the clients
10 provided input as requested?

11 A I don't recall one way or the other.

12 (Exhibit D
13 Marked for identification.)

14 Q I show you what is marked as Exhibit D to this
15 deposition, Miss Rendon, ask you if you can
16 identify it?

17 A This is a letter that I sent to Bill Haney on
18 August 18, 1997, regarding Molten Metal
19 Technology's agreement to indemnify its
20 employees.

21 Q Who is Bill Haney?

22 A Bill Haney was the chairman, president and CEO
23 of Molten Metal Technology.

24 Q Why did you send the letter?

25 A Because we had reached an agreement by which

1 Molten Metal Technology agreed to pay for
2 attorney's fees for its employees, and this
3 was detailing my understanding of what they
4 had agreed to do.

5 Q If you look at the first paragraph of that
6 letter, at the end of the first paragraph
7 there is a list of names; do you see that?

8 A Yes, I do.

9 Q Were those the Molten Metal employees whom you
10 represented at that point?

11 A That's correct.

12 Q Had each of those Molten Metal employees
13 received a letter the form of Exhibit B?

14 A They ultimately did. They may or may not have
15 received them by that date, the date of August
16 18, 1997.

17 Q In fact, is it fair to say they were more
18 likely to have received it on August 25, 1997,
19 according to Exhibit B?

20 A Yes, based on Exhibit B, I would say that is
21 fair.

22 Q Did you come to represent other Molten Metal
23 Technology employees later?

24 A Yes, I did.

25 Q Did you send engagement letters as you came to

1 represent them?

2 A Yes, I did.

3 Q Were terms of their representation by Epstein
4 Becker the same as those reflected in
5 Mr. Howie's engagement letter?

6 A Yes.

7 (Exhibit E
8 Marked for identification.)

9 Q Showing you what is marked as Exhibit E in
10 this deposition, do you recognize this
11 document?

12 A Yes, I do.

13 Q Can you tell me what it is?

14 A This is an internal Molten Metal Technology
15 letter, agreement from its chief general
16 counsel to Jim Howie dated August 18, 1997,
17 detailing the fact that Molten Metal
18 Technology has agreed to pay for Mr. Howie's
19 legal fees in connection with the
20 investigation.

21 Q I draw your attention back to Exhibit D for a
22 moment. The second page of Exhibit D, the
23 last paragraph of the second page where it
24 says in addition please provide to me for my
25 file a copy of this letter -- of the letter, a

1 sample of which is attached as Exhibit A to
2 this letter, executed by each of the employees
3 listed above, setting forth Molten Metal
4 Technology's agreement to indemnify them for
5 legal expenses incurred in connection with the
6 ongoing investigation detailed above; do you
7 see where it says that?

8 A Yes.

9 Q Do you know whether Exhibit E is that formal
10 letter?

11 A To the best of my memory the body of it is. I
12 do believe that I gave them a form of a letter
13 that I thought would be sufficient and
14 effective for my clients. Then Mr. Jacks put
15 it in final.

16 Q You are shown as a carbon copy on Exhibit E?

17 A Yes, I am.

18 Q Did you receive one of these for each of the
19 employees that you represented?

20 A Yes, I did to the best of my memory.

21 Q Did you meet with any of the employees before
22 they retained you?

23 A Yes, I believe I met with all the employees
24 before they retained me.

25 Q You had discussions with them pre-retention?

1 A Yes, I did.

2 Q Can you summarize that discussion?

3 A Yes. For the record it's my understanding
4 that with respect to my communications with my
5 clients who have not waived their
6 attorney/client privilege, that the substance
7 of those communications will be protected
8 under the confidentiality order.

9 In general terms, I told them about
10 myself, I told them about my law firm. Told
11 them what I knew at that point in time about
12 the nature of the investigation. Explained to
13 them that Molten Metal Technology had agreed
14 to indemnify its employees, so that they would
15 not have to personally pay out of pocket
16 expenses for legal representation in
17 connection with the investigation. Answered
18 questions that they had.

19 Told them that it was entirely their
20 decision as to whether or not they wanted to
21 retain me to represent them in connection with
22 the investigation. That if they did want to
23 retain me, in each instance I was also happy
24 to represent each of these individuals in
25 connection with the investigation.

1 Q Was there any discussion of the fact you were
2 representing a number of different employees
3 in connection with the representation?

4 A Yes, there was.

5 Q What was that?

6 A I explained to them the potential for
7 conflicts that can arise in situations where
8 an attorney is representing more than one
9 individual. Detailed for them all of the
10 potential conflicts that I could at that point
11 think of, with respect to the possibility of
12 multiple representation and the issues
13 associated with a client deciding to retain
14 counsel who was also representing other
15 individuals. Made sure that they understood
16 all of those issues, answered any questions
17 that they had with respect to concerns
18 regarding multiple representation.

19 Q To your knowledge, were any employees required
20 by Molten Metal Technology to use you as
21 counsel?

22 A They were not.

23 Q Did Epstein, Becker and Green at any point
24 represent Molten Metal Technology, itself?

25 A No.

1 Q Did you ever send Molten Metal Technology an
2 engagement letter?

3 A No, I did not.

4 Q Do you have any information why the employees
5 retained separate counsel from Molten Metal
6 Technology?

7 A In my experience it's pretty standard in
8 connection with these large scale criminal
9 investigations.

10 Ordinarily the government will object
11 to a single attorney representing both the
12 company and its employees, because from the
13 government's perspective the employees and the
14 company do not necessarily share a mutuality
15 of interest. Normally, they will not permit
16 an attorney who represents the company to
17 participate in voluntary interviews of
18 employees as their counsel.

19 In this situation, as is typical, good
20 corporate citizens don't want their employees
21 having to deal with this on their own in the
22 sense of having to either pay for an attorney
23 out of their own pocket, or potentially appear
24 for an interview and/or Grand Jury appearance
25 without a lawyer if they can't afford to

1 draft form in the document that has been
2 marked as Exhibit C?

3 A It appears to be, yes.

4 Q Was it your understanding that Molten Metal
5 Technology would keep the contents of this
6 memorandum confidential?

7 A To the extent that they could. I was hopeful
8 that they wouldn't provide a copy to the
9 Boston Globe. I did not think it would be in
10 anybody's best interest if they did.

11 Yes, I hoped that they would keep it
12 confidential. Could they guarantee that if
13 they received a subpoena, weren't able to keep
14 it confidential, no.

15 Q Did you consider it in your client's best
16 interest to send they memorandum to Molten
17 Metal Technology?

18 A Yes, I did.

19 Q Why was that?

20 A Among other things what my clients wanted was
21 for Molten Metal Technology to stay a viable
22 vibrant business and survive the
23 investigation. By providing, in general
24 terms, information to the attorneys who were
25 representing Molten Metal Technology and

1 others, I believe that I would help further
2 that important objective that my clients had.

3 In addition, I was hopeful that to the
4 extent that I was able to provide information,
5 that it was in my client's best interest to
6 provide, that I might in turn also get
7 information if it was in somebody else's
8 client's best interest to provide it to me.
9 Although I don't have -- there was no
10 expectation this was going to be a quid pro
11 quo. Just my internal analysis that when
12 people are cooperative, that sometimes that
13 can be beneficial to the clients.

14 Q Did you believe that you and your clients were
15 party to a joint defense agreement with Molten
16 Metal Technology?

17 A No, we were not.

18 (Exhibit G

19 Marked for identification.)

20 Q I place in front you what has been marked as
21 Exhibit G for this deposition. Can you
22 identify it?

23 A This is a retainer agreement between Epstein
24 Becker & Green and Christopher Nagel, dated
25 September 23, 1997.

1 Q You don't have any independent recollection of
2 this document?

3 A No, I do not.

4 Q Does this refresh your recollection in any way
5 whether or not Ethan was your initial contact
6 at MMT?

7 A It does not.

8 Q So much for that document.

9 You indicated that you did speak on a
10 periodic basis, I'm characterizing what you
11 said, periodic basis with Mr. Jacks; is that
12 correct?

13 MS. BAGGER: Objection.

14 A That is a fair characterization.

15 Q What were the nature of your discussions with
16 Mr. Jacks?

17 MS. BAGGER: Generally? Object to
18 the question.

19 A To the best of my memory, if I looked at my
20 time sheets I might be able to give you more
21 detailed information, I believe that I talked
22 to Mr. Jacks about MMT's agreement to
23 indemnify its employees.

24 I believe I talked to Mr. Jacks on
25 occasion regarding my invoices which were sent

1 to MMT pursuant to that indemnification
2 agreement.

3 I believe I talked to Mr. Jacks on
4 occasion when an employee would contact him to
5 let him know that they had been contacted by
6 either the FBI or DOE, asked him basically
7 what do I do next.

8 I talked to Ethan Jacks prior to
9 Mr. Nagel's appearance before Congress.

10 Q What did you discuss with Mr. Jacks in
11 connection with Mr. Nagel's appearance before
12 Congress?

13 A Who had been asked to testify. Mr. Jacks may
14 have provided me with a copy of correspondence
15 from Congress. Other than that I can't off
16 the top of my head think of any other subject
17 matters of conversations with Mr. Jacks.

18 Q Did you have any discussions at all with
19 Mr. Jacks concerning strategic matters related
20 to representation of either MMT or individual
21 employees of MMT?

22 A Strategic matters, not that I recall. I do
23 recall talking to him about the fact that
24 certain employees had agreed to appear for
25 interview. Some of those interviews took

1 looking at a document I can't recall his exact
2 position.

3 Q Did you have any direct dealings with
4 Mr. Berman?

5 A You mean conversations?

6 Q Yes.

7 A Yes, I did.

8 Q Do you recall how periodically you would speak
9 with Mr. Berman?

10 A Off the top of my head, no. I did speak to
11 him on occasion.

12 Q What were the nature of your discussions with
13 Mr. Berman?

14 A To the best of my memory they would have been
15 similar to the nature of my conversations with
16 Mr. Jacks.

17 Q Again, do you recall if you had any
18 discussions concerning strategic matters with
19 Mr. Berman?

20 A Not that I recall. I don't recall
21 conversations about planning any kind of
22 strategy. The only thing that might fit into
23 that category is a discussion in which
24 Mr. Berman may have participated in connection
25 with the Congressional hearing, sort of making

1 sure that everybody wasn't going to be saying
2 the same thing. So that different people who
3 had been asked to speak, would focus on
4 different general themes, rather than each
5 person repeating what the person before him
6 had already said.

7 Q Paula asked you a little earlier about a joint
8 defense agreement. I understand it's your
9 testimony that you were not party to a joint
10 defense agreement?

11 A That's correct.

12 Q Was your firm a party to a joint defense
13 agreement, Epstein, Becker & Green?

14 A No, it was not.

15 Q Were your clients parties to a joint defense
16 agreement?

17 A No, they were not.

18 Q Do you have an understanding whether or not
19 other parties involved in the FBI/DOE
20 investigation were parties to a joint defense
21 agreement?

22 A Yes, I believe in the documents that I
23 reviewed that have been produced in this case,
24 there was a written joint defense agreement
25 executed by a number of the other parties to

1 the investigation.

2 Q When you say you weren't or EBG wasn't, or
3 your clients weren't a party to a joint
4 defense agreement, are you including in that
5 any nonwritten agreements as well, informal
6 agreements?

7 A There was no joint defense agreement that I
8 entered into. I did on occasion provide
9 information to other lawyers, that I hoped
10 they would keep confidential, when I thought
11 that it was in my client's best interest to do
12 that. I may have loosely used the terminology
13 with them joint defense agreement. Not in the
14 formal sense of the word. Just in an informal
15 and imprecise use of language by lawyers.

16 Q What does the term joint defense agreement
17 mean to you, what is your understanding of a
18 joint defense agreement?

19 A My understanding of a joint defense agreement
20 is that you agree that your clients have
21 common interest in a particular piece or
22 pieces of litigation. That their position in
23 connection with that litigation is
24 sufficiently similar that you can work
25 together as if you were jointly representing

1 the clients. Share information among one
2 another, with an agreement that it will not be
3 shared outside of that circle.

4 That if there is a subpoena issued for
5 example for that information, that you will
6 notify all of the other attorneys, and jointly
7 resist the production of those records.

8 That in the event that a client agrees
9 for example to cooperate with the government,
10 you will immediately withdraw from the joint
11 defense agreement, notify the other parties
12 that you are withdrawing. Ordinarily return
13 to them any information that you have received
14 as a result of the joint defense agreement.

15 When I've been involved in joint
16 defense agreements we've often circulated
17 drafts of briefs or documents to one another
18 for input from other attorneys before they are
19 filed.

20 I've been involved in joint defense
21 agreements where I have filed pleadings on
22 behalf of both myself and other lawyers'
23 clients, but as part of the joint defense
24 agreement I was assigned the task of preparing
25 a particular pleading. They can contain other

1 types of things.

2 In essence you are drawing a circle
3 around a group of people, considering that you
4 are all in this together, representing your
5 clients basically jointly as part of joint
6 defense.

7 Q Do you believe that that, referring to the
8 last characterization you describe being all
9 in it together, you don't believe that applied
10 in connection with MMT employees and other
11 entities involved in the FBI/DOE
12 investigation, specifically MMT itself?

13 A I believe that there were instances where my
14 clients and MMT had common interests in
15 connection with the investigation, which is
16 why in some instances I felt comfortable
17 sharing information with MMT, but no, I didn't
18 believe that we were all similarly situated
19 sufficiently that it would have made sense or
20 been appropriate for my clients to be part of
21 a joint defense agreement.

22 For starters, none of my clients were
23 either subjects or targets of the
24 investigation. That from a very immediate
25 standpoint put them in a different position

1 than many of the other players.

2 Q Do you believe that a joint defense agreement
3 would have to be something executed in
4 writing?

5 MS. BAGGER: Are you asking her
6 generally?

7 MR. FLEISCHER: Yes, what her
8 understanding is.

9 A I have a preference for written joint defense
10 agreements in appropriate cases, so that there
11 is a record of exactly what it is you have
12 agreed to do and not to do.

13 Q I guess what I'm asking you is, do you believe
14 it's absolutely necessary for such an
15 agreement to be in writing?

16 MS. BAGGER: I will object.

17 A As with any contract, you can have an
18 enforceable oral contract. Most often in my
19 experience as a criminal defense attorney,
20 when you entered into a joint defense
21 agreement, it is ordinarily in writing. It's
22 also something you have to discuss with your
23 client, get their authorization to participate
24 in.

25 Q Have you seen a copy of the other joint

1 defense agreement between the other parties in
2 the litigation at any point in time?

3 A I saw it in connection with my preparation for
4 my deposition. I don't recall whether or not
5 I ever saw it prior to that. I don't believe
6 so because I didn't have a recollection of
7 having seen it. I do recall knowing that they
8 had a joint defense agreement. I don't recall
9 ever seeing it in writing.

10 Q Going to your recollection as it was back in
11 1997, who do you recall were the parties to
12 that joint defense agreement?

13 MS. BAGGER: Objection to the form
14 of the question.

15 A I don't know that I'll be able to tell you
16 everybody. Certainly I understood that Molten
17 Metal Technology, Bill Haney, Vic Gatto I
18 believe, Ethan Jacks, Eugene Berman to the
19 best of my memory were all parties to a joint
20 defense agreement.

21 MR. FLEISCHER: Let's mark K.

22 (Exhibit K

23 Marked for identification.)

24 Q Miss Rendon, the court reporter has handed you
25 what has been marked as Exhibit K. I ask you

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Eugene Berman 4-13-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

21

1 recollection is the company and individuals in the
2 company did receive letters. I do not recall reviewing
3 any letter to any individual employee of the company --

4 Q. Do you --

5 A. -- other than my own.

6 Q. Do you recall reviewing any subpoena in connection
7 with the investigation to any employees of the company?

8 A. I did not.

9 Q. And did you actually testify?

10 A. I did.

11 Q. Was that under oath?

12 A. I did.

13 Q. How long were you testifying for in terms of days?

14 A. One day before the house committee, and I don't
15 recall which committee or subcommittee, and before a
16 federal grand jury.

17 Q. Do you recall the -- strike that.

18 Do you recall who represented the various, any of
19 the various employees of Molten Metal Technology that
20 had received subpoenas or letters to testify?

21 A. Yes.

22 Q. Who was that?

23 A. I can't say comprehensively I recall, but Bill
24 Haney was represented by Hale and Dorr. Karen Green, I

1 believe, was the individual. Vic Gatto was represented
2 by a guy named Touhey who is now the baseball
3 commissioner, I think it's Bill Touhey. It doesn't
4 matter, and a number of individuals in the company were
5 represented by Epstein, Becker and Green.

6 Q. Do you recall the specific attorney that
7 represented the individuals?

8 A. I don't recall her full name.

9 Q. If I said the name Carole Schwartz Rendon, would
10 that refresh your recollection?

11 A. It seemed like her name changed midway, but, yes,
12 Carole is the individual that I recall.

13 Q. Do you know why MMT's counsel, Latham and Watkins,
14 didn't represent everyone connected with MMT in
15 connection with the investigation?

16 A. Various employees had either employment agreements
17 or the company policy was that if someone was accused
18 of any wrongdoing in the course of their employment,
19 the company had agreed to reimburse those individuals
20 for obtaining counsel and in that context, individuals
21 who chose to be represented, in fact, their attorney's
22 fees were paid and that was the case with regard to the
23 individuals who were represented by Epstein, Becker and
24 Green.

1 Q. Do you know why Latham and Watkins didn't
2 represent any of those individuals?

3 A. I do not.

4 Q. Do you recall the time frame when Epstein, Becker
5 and Green first got involved in representing the
6 individuals in connection with the investigations?

7 A. The only time frame I remember is 1998 because at
8 that time, one of my responsibilities was to review
9 bills.

10 Q. Reviewing bills from who?

11 A. From various counsel. We were operating under
12 Chapter 11 and our expenditures were being reviewed by
13 the creditor's committees and we had to present to them
14 projected expenditures and document expenditures that
15 were made, including expenditures of this type which
16 were the ones that I was more familiar with for the
17 representation of individuals in the context of these
18 investigations.

19 Q. Prior to MMT's bankruptcy, did you review bills
20 for counsel, outside counsel then?

21 A. No.

22 Q. So it was really only after the bankruptcy that
23 you started to --

24 A. Let me clarify that, if I may. I did review

1 environmental. My responsibilities were for
2 environmental permitting and we had counsel in Texas or
3 counsel in Tennessee who did environmental work for us
4 and that was part of my budget and part of my
5 responsibilities. Sometime in 1998 because I was
6 involved and there were fewer people in the company, I
7 was given the responsibility of reviewing these bills,
8 as well.

9 Q. Do you recall how -- well, strike that.

10 Were you at all involved in the decision to hire
11 Epstein, Becker and Green to represent the individuals
12 in --

13 ATTY. BAGGER: Objection. Foundation.

14 Q. -- in connection with the investigation?

15 ATTY. BAGGER: Objection. Lack of foundation for
16 the question.

17 THE WITNESS: I was not involved in the decision
18 on anybody's part to hire Epstein, Becker and Green.
19 My knowledge is limited to the review of bills of
20 individuals, billings from Epstein Becker for
21 individuals who had elected, for whatever reason, to be
22 represented by Epstein Becker.

23 Q. Do you recall whether you had any discussions
24 directly with Ms. Rendon prior to her being retained by

1 party to a joint defense agreement of any form in
2 connection with the investigations? I'm not
3 questioning you on the document, by the way.

4 A. Okay. I'm not sure I have a -- I certainly don't
5 have a specific recollection of that.

6 Q. What do you recall generally then?

7 ATTY. BAGGER: About joint defense agreements?

8 ATTY. FLEISCHER: About joint defense agreements.

9 THE WITNESS: I have to say my recollection is
10 unclear on that. Just in my general experience with
11 multi-party cases, joint defense agreements are common.
12 I wouldn't be surprised if there was one, but I don't
13 recall there specifically being one.

14 ATTY. FLEISCHER: I'm going to mark this as the
15 next document here.

16 (Exhibit 3, 10/23/97 FAX TRANSMISSION, marked for
17 identification.)

18

19 Q. Mr. Berman, as you look at that document, I would
20 draw your attention to the "re".

21 ATTY. BAGGER: On the first page?

22 ATTY. FLEISCHER: Yes.

23 THE WITNESS: Okay.

24 Q. And also to the subject, the subject line on the

Eugene Berman 4-13-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

31

1 second page. I believe you've looked at that?

2 A. Yes.

3 Q. Does this refresh your recollection whether there
4 was a joint defense agreement or arrangement concerning
5 the investigations?

6 ATTY. BAGGER: Objection.

7 THE WITNESS: I think I previously testified I
8 would not have been surprised if there is one, but my
9 actually testimony is I honestly don't recall that
10 there, in fact, was one.

11 Q. And this document doesn't change your recollection
12 or refresh your recollection?

13 A. It just confirms what I said a moment ago. I
14 would not find this to be surprising. It would suggest
15 there was one, but, again, I don't recall whether there
16 was or was not.

17 Q. Do you have any reason to think there wouldn't
18 have been one?

19 ATTY. BAGGER: Objection.

20 THE WITNESS: I have no reason to know whether
21 there was or wasn't or why there was or wasn't a joint
22 defense agreement.

23 Q. Do you have any recollection of whether or not
24 attorneys from Epstein, Becker and Green and

1 specifically Carole Schwartz Rendon, were communicating
2 directly with lawyers from Latham and Watkins
3 concerning the investigations?

4 A. I have no knowledge.

5 ATTY. BAGGER: Objection. Foundation.

6 THE WITNESS: I have no knowledge of that.

7 ATTY. FLEISCHER: Let's mark this.

8 (Exhibit 4, 8/25/97 MEMO FROM CAROLE SCHWARTZ
9 RENDON, marked for identification.)
10

11 Q. Okay. Mr. Berman, you've just been handed what's
12 been marked as Exhibit 4, and if you could just take a
13 look at this document, please?

14 A. Okay.

15 Q. Do you have any recollection of having ever seen
16 this document before?

17 A. I don't have a specific recollection of seeing
18 this document, no.

19 Q. Do you have a general recollection of the matters
20 that are addressed in this memorandum?

21 A. Let me be clear on how I'm answering this. Yes,
22 the matters in here I'm certainly, as I previously
23 testified, that there were issues of campaign
24 contributions, it pertained to the PRDA, which was one

1 of the DOE contracts.

2 Q. Do you recall what PRDA stands for?

3 A. Planned Research Development Agreement or Program.

4 I'm not absolutely certain.

5 Q. But you have no specific recollection of the
6 document itself?

7 A. I do not.

8 Q. Do you have any specific recollection of
9 discussing the matters raised in this memorandum with
10 Carole Schwartz Rendon?

11 A. I have no recollection of discussing these matters
12 with Ms. Rendon.

13 Q. And do you recall whether or not you had any hand
14 in drafting this document?

15 A. It purports to be from Ms. Rendon and I appear to
16 be a recipient of it. To answer your question, no. I
17 have no recollection of me having a hand in drafting
18 this, no.

19 Q. Do you recall if you have ever seen it in draft
20 form?

21 A. I don't have a recollection of it.

22 Q. Can you turn to Page 6 of this document, Exhibit
23 4?

24 A. Yes.

Eugene Berman 4-13-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

34

1 Q. And there is a section there that's titled, V, in
2 Roman Numerals, "Concerns"?

3 A. Yes.

4 Q. I would ask you if you could read that section
5 just a little closely to yourself and that runs onto
6 Page 7, through Points 1, 2, 3, 4 and 5. Just let me
7 know when you've read those.

8 A. Okay.

9 Q. And now, turning back to Page 7, we'll go to the
10 first numbered point.

11 A. Yes.

12 Q. Do you know who Clyde Frank was?

13 A. I have a general recollection that he was an
14 employee of the Department of Energy.

15 Q. Now, Mr. Gatto, how do you pronounce his name?

16 A. That's correct, Gatto.

17 Q. Do you recall who represented Mr. Gatto in
18 connection with the investigations?

19 A. Mr. Touhey.

20 Q. He was not represented by Epstein, Becker and
21 Green?

22 A. Not to my knowledge, no.

23 Q. Do you recall having any discussions with
24 Ms. Rendon concerning the substance of Point 1?

Eugene Berman 4-13-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

35

1 A. I do not.

2 Q. Do you recall having any discussions with any of
3 the other officers or directors, employees of MMT
4 concerning the substance of the matters raised in Point
5 1?

6 A. I do not.

7 Q. Do you understand how the matter or the substance
8 of the matter raised in Point 1 would have affected
9 other individual employees of MMT?

10 ATTY. BAGGER: Objection to the form of the
11 question.

12 THE WITNESS: I do not.

13 Q. With respect to Point 2, do you recall having any
14 discussion with Ms. Rendon concerning the substance of
15 Point 2?

16 A. I do not.

17 Q. Do you recall having any discussions with any
18 other officers or directors or employees of MMT
19 concerning the substance of the matter addressed in
20 point 2?

21 A. I do not.

22 Q. And do you have any understanding of how the
23 substance of the -- strike that.

24 Do you understand how the issue raised in Point 2

Eugene Berman 4-13-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

36

1 would directly affect clients of Ms. Rendon --

2 ATTY. BAGGER: Objection.

3 Q. -- in the investigation?

4 ATTY. BAGGER: Objection. Foundation.

5 THE WITNESS: I do not.

6 Q. Point 3, do you recall discussing the substance of
7 Point 3 with Ms. Rendon?

8 A. I do not.

9 Q. Do you recall discussing the substance of Point 3
10 with any other officers, directors or employees of MMT
11 with Ms. Rendon -- strike that question.

12 Do you recall discussing the substance of the
13 matter raised in Point 3 with any other officers or
14 directors or employees of MMT?

15 A. I don't have any specific recollection of that.
16 Although, I do recall generally that discussions were
17 had about what the campaign contribution laws were and
18 what we needed to do to make sure we were legal in what
19 we did.

20 Q. Do you recall who you might have had those
21 discussions with?

22 A. No.

23 Q. Could it have been with Ms. Rendon?

24 A. No. I thought your question was MMT employees.

1 Q. I'm asking a different question now.

2 ATTY. BAGGER: To which I object to. Asked and
3 answered.

4 Q. Do you have any understanding how the issue raised
5 in Point 3 would have directly affected Ms. Rendon's
6 clients in the investigation?

7 ATTY. BAGGER: Objection. Foundation.

8 THE WITNESS: I do not.

9 Q. Point 4, please. Do you recall having any --
10 strike that.

11 Do you recall having any discussions with
12 Ms. Rendon concerning the issue raised in Point 4?

13 A. I do not.

14 Q. Do you recall having any discussions with any
15 other officers or directors or employees of MMT
16 concerning the issue raised in Point 4?

17 A. Other than repeating what I said before,
18 contributions, whether they be cash or in kind, we were
19 sensitive and I would recall general discussions of
20 that issue for compliance reasons, but I don't recall
21 any specific conversations or with whom I might have
22 had that conversation within MMT.

23 Q. Say that again.

24 A. With MMT employees. I have no such recollection

1 of any such conversations with Ms. Rendon. I'm
2 answering that with regard to what I thought your
3 question was with regard to MMT employees.

4 Q. Do you recall the specific MMT employees?

5 A. I do not.

6 Q. Do you have any understanding of how the issue
7 raised in Point 4 would have any effect on Ms. Rendon's
8 clients in the investigation?

9 A. I do not.

10 Q. And, lastly, I'm going to ask the same series of
11 questions with respect to Point 5.

12 A. Certainly.

13 Q. Do you recall having any discussions with
14 Ms. Rendon concerning the issues raised in Point 5?

15 A. I do not.

16 Q. Do you recall having any discussions with other
17 officers, directors or employees of MMT -- I'm sorry.
18 Strike that.

19 ATTY. BAGGER: You keep saying other employees and
20 officers of MMT after asking about Ms. Rendon who is
21 not an officer or employee of MMT.

22 ATTY. FLEISCHER: I struck the question and for
23 that reason.

24 ATTY. BAGGER: Okay.

1 Q. Do you recall having any discussions with any
2 officers or directors or employees of MMT concerning
3 the issues raised in Point 5?

4 A. I do not.

5 Q. Do you have any understanding as to how the issue
6 raised in Point 5 would have any impact on Ms. Rendon's
7 clients?

8 ATTY. BAGGER: Objection.

9 THE WITNESS: I do not.

10 Q. We're done with that document. You don't have to
11 look at it anymore.

12 A. Thank you.

13 ATTY. BAGGER: Anymore than you need to.

14 ATTY. FLEISCHER: Off the record a second.

15

16 (Recess taken.)

17

18 ATTY. FLEISCHER: Back on the record. Mark this.

19 (Exhibit 5, JOINT DEFENSE DOCUMENT, marked for
20 identification.)

21

22 Q. You've just been handed what's been marked Exhibit
23 5, I believe, Mr. Berman.

24 A. Yes.

1 A. I have no, you know, current recollection of it.
2 Although, I have no reason to think it's not an
3 accurate depiction of what -- well, it looks like my
4 signature at the bottom.

5 Q. Turn to the fourth page.

6 A. Fourth page of the whole document?

7 Q. Yes, and what does that appear to you to be
8 there -- strike that.

9 What is it that you note there -- strike that, as
10 well.

11 A. I want to make sure I'm looking at the right page.

12 Q. There are the numbers RW852 in the lower
13 right-hand corner.

14 A. Correct.

15 Q. Do you see time entries for 2/27/98?

16 A. I do.

17 Q. Can you just take a look at those, read those to
18 yourself for a moment?

19 ATTY. BAGGER: Can you read the Bates number
20 again?

21 ATTY. FLEISCHER: RW852.

22 ATTY. BAGGER: Thank you.

23 THE WITNESS: Okay.

24 Q. Who was J. Grabmeier?

1 A. One of the accounting people at MMT.

2 Q. He was an MMT employee?

3 A. Correct.

4 Q. Do you recall having -- and, again, do you recall
5 having any particular, any telephone conferences with
6 Carole Schwartz Rendon?

7 A. Well, this certainly suggests I did have them. To
8 answer your question specifically, I don't really
9 recall having those conversations.

10 Q. And these -- the time entries that appear on this
11 document and there are several here that reference you?

12 A. Correct.

13 Q. None of them refresh your recollection as to
14 conferences with Carole Schwartz Rendon?

15 ATTY. BAGGER: To whether there were conversations
16 or the context of the conversations?

17 ATTY. FLEISCHER: I'm not asking about the
18 contents. Just whether or not it refreshes his
19 recollection.

20 ATTY. BAGGER: As to whether he had conversations
21 with Carole Rendon?

22 THE WITNESS: As I said, I previously testified I
23 think that I knew who she was. My job was to review
24 invoices for payment. Reading this, the only further

1 refreshment of my recollection would be there were also
2 scheduling issues as far as when these people were to
3 be made available and when they were, you know, being
4 either subpoenaed to testify and I do -- I would
5 certainly think at least that's what the substance of
6 these entries might suggest.

7 Q. So you do recall that you spoke with her directly
8 about scheduling the testimony of the individuals that
9 she represented?

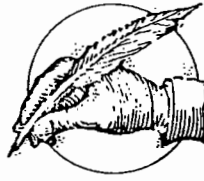
10 A. My recollection is most clearly that it was on
11 budgetary concerns, but I do have a general
12 recollection, and this somewhat refreshes it, that I
13 would have logically additionally spoke about
14 scheduling, availability and when these -- we had a
15 very small company at that point and getting these
16 people kind of pulled out of the office and tied up was
17 one of the concerns that I was also addressing, yes.

18 Q. With respect to the budget, was there a set budget
19 for each of the firms involved or was there a
20 litigation budget?

21 A. At some juncture there was a set budget that was
22 approved by the creditor's committee. That's the only
23 strong recollection that I have. Prior to that, prior
24 to let's say the Chapter 11 proceedings being

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Transcript of the Testimony of:

Ethan Jacks

April 12, 2006

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Robert Hanfling v. Epstein, Becker & Green, et. al.

16

1 A. My recollection is that, and, again, I don't know
2 specifically what they were asked to do other than I do
3 recall that they were asked to provide, be available
4 for interviews and as to the number, I would hazard,
5 this is just my recollection, somewhere between ten and
6 twenty.

7 Q. With respect to the individual employees, officers
8 and directors that were required to provide
9 information, did they have representation, do you
10 recall, in the investigation?

11 A. I think that there were a group of individuals
12 who, like myself, retained personal counsel and we also
13 retained a woman named Carole something Rendon, who I
14 think was with Epstein Becker, I don't remember that
15 specifically, to represent a number of folks
16 individually except, I believe, we, the company, agreed
17 to pay the costs of that representation up to some
18 point or some amount, but I don't remember the details.

19 Q. Do you think the name was Carole Schwartz Rendon?

20 A. Yes. That's correct.

21 Q. Do you know why Latham and Watkins didn't assume
22 the role of representing individual officers, directors
23 and employees in the investigation?

24 ATTY. BAGGER: Objection to the form of the

Ethan Jacks 4-12-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

17

1 question as compound.

2 THE WITNESS: I don't remember why and I -- I
3 don't remember why. I can only assume now in
4 retrospect that there was some view that if Latham was
5 oriented to company counsel, that there would be a
6 reason to have somebody -- you know, a different lawyer
7 from a different law firm focused on individuals, but I
8 don't remember the specific reason.

9 Q. Do you recall when about -- about when, excuse me,
10 EBG began to represent employees in the investigation?

11 ATTY. BAGGER: Objection. Foundation.

12 THE WITNESS: "EBG" is Epstein Becker?

13 Q. Yes. Another definition, when I refer to "EBG,"
14 I'm referring to the firm of Epstein, Becker and Green.

15 A. Unfortunately, I don't remember exactly when. I
16 assume it would have been contemporaneous with the
17 receipt of the request for information, but I don't
18 remember specifically when.

19 ATTY. FLEISCHER: I'm going to mark a document.
20 This will be one.

21 (Exhibit 1, 8/5/97 DOCUMENT, marked for
22 identification.)

23

24 Q. Okay. Mr. Jacks, I've just handed you what's been

Ethan Jacks 4-12-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

20

1 ATTY. FLEISCHER: That's fair.

2 Q. With respect to those employees that were
3 represented by Epstein, Becker and Green, did MMT have
4 a role in determining who that counsel would be?

5 ATTY. BAGGER: Objection.

6 Q. You may answer.

7 A. I would say insofar as I was the general counsel,
8 you know, among my job was to help advise the company
9 on decisions and selections like this, yes. You know,
10 the corporation rarely speak with one voice. They
11 speak with officers and directors making decisions
12 about things. So indirectly, yes, but it would have
13 been sort of through me and I assume our outside
14 counsel, Latham and Watkins, would have been advising
15 me on these decisions.

16 Q. Those individuals that were represented by EBG in
17 the investigations, did they have much input, do you
18 recall, in the selection of their attorney?

19 ATTY. BAGGER: Objection.

20 THE WITNESS: I honestly don't remember the
21 details. I think our decision was to try to offer, not
22 require, but offer Carole as somebody who could
23 represent them if they chose, but to not in any way
24 mandate that.

Ethan Jacks 4-12-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

21

1 Q. Do you recall thinking back to the period whether
2 or not it was important to MMT that those employees
3 that were represented by Carole Schwartz Rendon in fact
4 all be represented by the same counsel?

5 A. I don't know if that was a driving factor. I
6 think the driving factor was more to see if we could
7 simply be helpful to people and to fray some of the
8 costs and anxiety by saying here is a lawyer that you
9 might use if you choose to.

10 ATTY. FLEISCHER: I'm going to mark another
11 document. This is number 2.

12 (Exhibit 2, DOCUMENTS, marked for identification.)
13

14 Q. Mr. Jacks, you were just handed a document, what's
15 been marked as Exhibit 2. Can you please take a look
16 at that document? Do you recall ever seeing this
17 document before?

18 A. I don't remember specifically seeing this
19 document.

20 Q. Okay. You are familiar with the law firm of Cohn
21 and Kelakos, LLP?

22 A. In deed.

23 Q. And who were they?

24 A. They were, and I'm not sure if they still are, a

Ethan Jacks 4-12-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

33

1 ATTY. FLEISCHER: Back on the record.

2 Q. I've just handed you what the court reporter has
3 marked as Exhibit 4. Again, I'll disclose to you this
4 was a document produced by the firm Reimer Braunstein
5 in --

6 A. Reimer. There is no rhyme or reason to the names,
7 is there?

8 Q. -- Reimer and Braunstein in response to the
9 document subpoena issued by Defendant's counsel in this
10 case. I would ask you take a look at that for a
11 moment.

12 A. I'm sorry, what was the preface you gave to this?

13 Q. That the document was produced by the firm Reimer
14 and Braunstein in response to a document subpoena in
15 this litigation, the instant litigation.

16 A. Okay.

17 Q. My question on this document for you relates to
18 the "re" on the first page and the subject on the
19 second page. There is a reference there to joint
20 defense, joint defense conference call. Do you see
21 that?

22 A. I do.

23 Q. Can you see that on both documents?

24 A. Yes.

Ethan Jacks 4-12-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

34

1 Q. Do you recall whether or not there was a joint
2 defense agreement among the various counsel that are
3 listed on these documents?

4 A. Well, first of all, I don't -- I don't recall this
5 document to start with that.

6 Q. I'm not asking if you recall the document. I'm
7 asking whether you recall a joint defense?

8 A. I do remember the discussion of joint defense
9 agreement and I do believe there was a joint defense
10 agreement in effect. But I could not tell you, I
11 assume -- I know the company was party to a joint
12 defense agreement, but I couldn't tell you specifically
13 with who.

14 Q. Do you know or do you have an idea as to whether
15 Epstein Becker was a party to the joint defense
16 agreement?

17 ATTY. BAGGER: Objection.

18 THE WITNESS: Again, I can't recall literally the
19 form or substance of any joint defense agreement. I do
20 recall discussions not infrequently about the reason,
21 the wisdom for joint defense agreements and I have a
22 vague recollection of having signed one, but I can't
23 remember the time, place or specifics of it.

24 Q. And, again, do you have, and I know you don't know

Ethan Jacks 4-12-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

41

1 counsel involved in the investigations?

2 A. Well, again, based on having seen Exhibit 3, there
3 seems to be a correlation there, yes.

4 Q. I'll have you turn to Page 7.

5 A. Which one?

6 Q. Page 7 of Exhibit 5.

7 A. Okay.

8 Q. And you'll note at the top of the page, these
9 actually appear under Section V, Concerns, which runs
10 over from the prior page.

11 A. Okay.

12 Q. I just want to just ask you some questions about
13 these numbered concerns.

14 A. Okay.

15 Q. Take a look at the first numbered concern. I'll
16 read it, "Vic Gatto, G-A-T-T-O and Clyde Frank had an
17 exceptionally close relationship. Clyde may have gone
18 over the line in promising to deliver money to MMT
19 without appropriate documented authorization for such
20 promises." Who was Clyde Frank?

21 A. By the way, it's -- I'm sorry I keep doing this to
22 you, it's pronounced Gatto, at least that's how I
23 recall it being pronounced.

24 I believe Clyde Frank was a Department of Energy

Ethan Jacks 4-12-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

42

1 employee. I don't recall his specific title.

2 Q. Do you know his connection to MMT at the time?

3 ATTY. BAGGER: Clyde Frank?

4 Q. Clyde Frank, yes.

5 A. I believe he was one of the folks and probably one
6 of the more senior folks that we interacted with, I
7 don't know specifically what his title or division was
8 at the Department of Energy, but just that he worked at
9 Department of Energy and that he was interested in our
10 technology and probably in the group of folks that were
11 responsible for reviewing our request for government
12 contracts through the DOE.

13 Q. Do you have any recollection of how this issue
14 outlined in paragraph, the first numbered paragraph
15 here, how that was resolved?

16 ATTY. BAGGER: Objection.

17 THE WITNESS: No, I don't. I don't even know what
18 your question is exactly.

19 Q. Do you know if anything ever became of this issue
20 beyond this memorandum?

21 A. The "issue" being what exactly?

22 Q. The issue being whether or not Clyde went over the
23 line in promising to deliver money to MMT without
24 appropriate documenting authorization?

Ethan Jacks 4-12-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

43

1 A. I don't remember specifically how that issue such
2 as it was or at least characterized in this document
3 was resolved. Having reread some of these documents to
4 get back to our original case, there was clearly
5 some -- within the investigation there was a DOE piece
6 and my recollection is that after the investigations
7 were over, there was no action. I don't remember any
8 specific action taken. So I assume that it was
9 resolved relevant to the parties' satisfaction.

10 Q. Do you recall having any discussions with other
11 MMT officers or directors or counsel regarding the
12 issue that is raised in this first point?

13 A. No. No recollection of that.

14 Q. I'll have you read quickly number 2 to yourself
15 and then number 3.

16 A. Okay.

17 Q. Just tell me when you are all set.

18 A. Okay.

19 Q. Do you recall having any discussions with other
20 MMT officers, directors or employees regarding the
21 issue raised in Point 2?

22 A. Absolutely not.

23 Q. Do you recall having any discussions with any of
24 the other attorneys involved in the investigations

Ethan Jacks 4-12-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

44

1 regarding the points raised in number 2?

2 A. No.

3 Q. Do you recall ever having a discussion with Carole
4 Schwartz Rendon about the matters raised in number 2?

5 A. Nope.

6 Q. Okay. Going to number 3, I think you've read
7 number 3 already?

8 A. Yes.

9 Q. Do you recall having any discussions with any
10 other MMT officers, directors or employees regarding
11 issues raised in number 3?

12 A. I have no current recollection of that, no.

13 Q. Do you have any recollection of discussing that
14 matter with any of the attorneys involved in the
15 investigations?

16 A. No specific recollection. I can see, having read
17 this memo, that the subject of campaign contributions
18 was one of the focal points of the investigation and
19 from having read this, it appears that that was not a
20 problem. But I have no specific recollection of having
21 discussed it.

22 Q. And take a look now at number 4 and number 5. Let
23 me know when you've finished reading those.

24 A. Okay.

Ethan Jacks 4-12-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

45

1 Q. With respect to Point 4 there on Page 7, do you
2 recall having any discussions with other officers or
3 directors or employees of MMT regarding the issue
4 raised in Point 4?

5 ATTY. BAGGER: Objection. Do you mean the subject
6 matter or the fact that it was flagged in this memo?

7 ATTY. FLEISCHER: No. The subject matter.

8 THE WITNESS: No.

9 Q. Do you recall ever having any discussions with any
10 of the attorneys involved in the investigations
11 regarding the substance of the matter raised in Point
12 4?

13 A. I don't have a recollection of that, no.

14 Q. With respect to Point 5, and again with respect to
15 the substance of the matter raised in Point 5, before I
16 go on -- strike that.

17 Do you recall ever having any discussion with
18 Carole Schwartz Rendon about the substance of the
19 matter raised in Point 4?

20 A. No. I don't have a recollection of that.

21 Q. With respect to Point 5, do you recall having any
22 discussion with any other MMT officers, directors or
23 employees regarding that matter?

24 A. I have no specific recollection of that. That's

Ethan Jacks 4-12-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

46

1 getting into, frankly, very technical areas that I
2 don't think were within my scope of responsibilities.

3 Q. Do you have any general recollection?

4 A. No. I remember now having read this document, I
5 had forgotten even what the acronym -- the PRDA
6 acronym, but it was then known as, it was pronounced
7 the "PRDA" and that's what we called it and that was
8 one of the government contracts we had and my
9 recollection is that it was extended once or twice. So
10 it was a significant you know -- significant to the
11 company and I don't recall any problems with the
12 administration of it.

13 Q. Do you recall what PRDA stands for?

14 A. I don't. Just that we called it the "PRDA", but
15 that's just the phonetic pronunciation of the acronym.

16 Q. Can you describe what the PRDA was?

17 A. I can't specifically because, again, that was not
18 my area of responsibility or expertise. But I believe
19 that was the -- that was the primary government
20 contract with the Department of Energy that we had at
21 least in the beginning and I think it stayed in effect
22 for several years.

23 Q. Okay. And, again, you don't recall ever having
24 any discussion with Carole Schwartz Rendon about the

Ethan Jacks 4-12-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

47

1 substance of the matter raised in Point 5?

2 A. I don't recall that, no.

3 Q. Okay.

4 A. Again, I'll point out, this is now, you know,
5 coming up on nine years ago.

6 Q. Nine years. I don't mean to swamp you with paper
7 here.

8 ATTY. FLEISCHER: Off the record.

9

10 (Recess taken.)

11

12 ATTY. FLEISCHER: Back on the record. Can you
13 mark this as 7, please.

14 (Exhibit 7, 4/7/98 LETTER, marked for
15 identification.)

16

17 Q. I've handed you a document that's been marked as
18 Exhibit 7. I'll ask you to take a look at that and the
19 attachment, as well.

20 A. Okay.

21 Q. The first page, can you identify that document,
22 please?

23 ATTY. BAGGER: The entire document or just the
24 first page?

Ethan Jacks 4-12-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

69

1 Q. Were you aware that Epstein Becker had filed a
2 proof of claim in the MMT bankruptcy case?

3 A. I was not aware of that, no.

4 Q. So had you ever seen this document before?

5 A. No not to my recollection.

6 Q. And no one had ever asked you to review the
7 documents -- I mean, the pages contained in the proof
8 of claim?

9 A. No, not to my recollection.

10 Q. Do any of the entries, and I note that you thumbed
11 through it, do any of those entries refresh your
12 recollection as to discussions you may have had with
13 Carole Schwartz Rendon independently of just having
14 seen them in this document?

15 A. Again, I don't remember specific discussions with
16 Carole. I do remember the fact that she worked for us
17 or she was retained on behalf of employees, but paid by
18 us, "us" meaning Molten Metal, and that from seeing
19 these time entries, it indicates that she and I had
20 discussions about different matters during the relevant
21 time period.

22 Q. Okay.

23 ATTY. FLEISCHER: That's actually all I have,
24 Paula.

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Transcript of the Testimony of:

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16

1 ATTY. COOKE: If it is, I'm not going to have a
2 problem with it. But you are asking him now about
3 conversations he had with people in 1999.

4 ATTY. FLEISCHER: Well, let's understand what the
5 litigation is about here. It's about representation of
6 Allied Technology Group that took place in late 1998
7 and into 1999.

8 ATTY. COOKE: No. The liability phase goes to
9 what happened with respect to what Epstein, Becker and
10 Green knew prior to the closing on December 1, 1998.
11 We have a court order. I might even have it with me.

12 ATTY. FLEISCHER: Let's go off the record.

13

14 (Discussion held off record.)

15

16 ATTY. FLEISCHER: Back on the record.

17 Q. Are you -- do you have any understanding of
18 whether or not Epstein, Becker and Green was party to a
19 joint defense agreement in connection with the MMT
20 investigations?

21 A. I don't know whether they were or not.

22 Q. You don't know. Do you have any reason to believe
23 they may have been?

24 ATTY. COOKE: Objection.

Michael Tuteur 4-13-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

17

1 THE WITNESS: I have no reason to believe that
2 they were.

3 Q. That's essentially what I'm asking.

4 A. Slightly different.

5 Q. Do you recall specifically when you first started
6 speaking with -- strike the question.

7 When did you first start to get involved in the
8 MMT matter?

9 ATTY. COOKE: Objection. What do you mean by the
10 "MMT matter"?

11 ATTY. FLEISCHER: The investigations. The matters
12 that Ms. Rendon had been working on?

13 ATTY. COOKE: Objection to the form of the
14 question. No foundation.

15 THE WITNESS: I don't believe that I ever actually
16 got involved with the investigations. Ms. Rendon left
17 Epstein Becker and asked me whether I would, in the
18 event that the investigations continued, serve as local
19 counsel to her, you know, if she needed to come to
20 Boston or needed something done with the various
21 agencies. My recollection is she took the file. She
22 intended to continue to keep those clients if, but only
23 if, the investigation, in fact, continued.

24 My recollection is that it had pretty much run its

Michael Tuteur 4-13-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

23

1 shareholder's litigation, rather?

2 A. I don't believe I worked on this because I wasn't
3 representing the parties at this time.

4 Q. Do you have any understanding as to why this
5 document would have been directed to you by Ms. Rendon?

6 A. Yes.

7 Q. Why would she have sent this one to you, if you
8 know or if you can surmise?

9 A. Well, I can't say specifically what Ms. Rendon was
10 thinking.

11 Q. Right. I wouldn't think you could.

12 A. But in or about this time period, Ms. Rendon
13 called me and said that Dr. Nagel -- well, that she
14 was -- that Dr. Nagel was considering or was going to
15 need separate representation in the shareholder's case,
16 in the securities case and I don't remember exactly the
17 time frame or the time sequence, but originally
18 Ms. Rendon was contemplating that she would represent
19 Dr. Nagel in that matter and that perhaps I could
20 serve, subject to Dr. Nagel's okay and subject to the
21 insurance company's approval, that I would serve as
22 local counsel to her in the securities case.

23 As time progressed, and it may have been early in
24 November, later in November, I don't remember, it

Michael Tuteur 4-13-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

24

1 became evident that it probably made more sense for me
2 to represent Dr. Nagel in the securities case if Dr.
3 Nagel wanted me to represent him and if EBG, Epstein
4 Becker, would be approved to go on the panel for, I
5 don't remember if it's Chub or AIG, the D and O
6 carrier.

7 So during the month of November preliminarily with
8 an idea towards potentially representing Dr. Nagel in
9 that case, Ms. Rendon sent me a small number of
10 documents to essentially apprise me of what was
11 happening in the securities case and I believe these
12 documents were her effort to do that.

13 Q. Was any application -- strike that.

14 Did anything become of that representation in
15 1998, before December 1st of 1998?

16 A. I believe I met with Dr. Nagel on the 1st, I think
17 it was the first time I ever met Dr. Nagel, perhaps I
18 met him in the hall at Epstein Becker when meeting with
19 Carole just to be introduced to say hello, but I
20 believe the first substantive meeting I ever had with
21 Dr. Nagel was on December 1, and my best recollection
22 is that on December 3, the insurance company indicated
23 that it was willing to allow Epstein Becker to be
24 counsel even though we had not previously been on their

Michael Tuteur 4-13-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

25

1 D and O panel.

2 Q. Epstein Becker -- strike par.

3 Did Epstein Becker represent Dr. Nagel in the
4 securities investigation?

5 ATTY. COOKE: Objection as to time.

6 THE WITNESS: I guess ultimately, yes.

7 Q. When you say "ultimately" --

8 A. Bingham Dana represented all the officers and
9 directors in the securities litigation. And at some
10 point, and I don't remember exactly when, the
11 determination was made that Bingham could no longer
12 represent all the officers and directors and this is
13 sometime I think, I think well after December 1, 1998
14 Bingham withdrew as counsel for all the officers and
15 directors and they each got separate counsel and at the
16 time, I began to represent Dr. Nagel, Mr. Preston and
17 Mr. Strong.

18 Q. About when did that representation commence?

19 A. I think -- I guess the question is: What do you
20 mean by "representation"?

21 Q. Serve as counsel, advise regarding liability in
22 that connection, strategy, defense, all of the things
23 that you might typically think of when you are
24 defending somebody in a litigation.

Michael Tuteur 4-13-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

26

1 A. You are talking about two different things. I
2 don't recall when or if I entered an appearance for
3 those three gentlemen in the securities case. I just
4 don't remember. I don't believe I did it in 1998 and I
5 don't remember when I did it, if I did it.

6 In December of 1998 I think Dr. Nagel, once we had
7 been approved, I think Dr. Nagel agreed, decided that
8 he did want me and Epstein Becker to represent him in
9 the securities case, to advise him, and he suggested
10 that in addition, his colleagues, Mr. Preston and
11 Mr. Strong, should be represented by Epstein Becker as
12 well.

13 So I think in December we began to represent the
14 three gentlemen, but I don't know about whether it was
15 formally in connection with the securities case.

16 Q. Okay.

17 ATTY. FLEISCHER: Please mark this.

18 (Exhibit 3, 11/16/98 EBG DOCUMENT, marked for
19 identification.)

20

21 Q. This is Exhibit 3.

22 A. Is it your intention that these three separate
23 documents would be one exhibit?

24 Q. Yes. They were provided to us stapled together so

Michael Tuteur 4-13-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

37

1 that's reflected in the memorandum that was marked as
2 Exhibit 3.

3 Can you tell us in what capacity you were involved
4 in that decision making?

5 A. I was the vice chair of Epstein, Becker and
6 Green's quality assurance committee.

7 Q. I also want to ask you about the third page of
8 Exhibit 3, which is your memorandum to Kathryn Johnson,
9 Jarvis Kellogg and Mr. Torres dated November 16, 1998.

10 You previously testified that you did not
11 represent Mr. Nagel until after December 1, 1998. I
12 want to draw your attention to the line in the second
13 paragraph there that says, "We, specifically I,
14 continue to represent Chris in connection with the
15 shareholder litigation against MMT and its former
16 officers and directors."

17 To what were you referring in that sentence?

18 A. Well, by this time, Ms. Rendon had asked me
19 whether I would be interested, subject again to Dr.
20 Nagel's and the insurance company's okay, to serve as
21 counsel to Mr. Nagel -- Dr. Nagel in the shareholder
22 litigation. By this time, she had sent me a couple of
23 these memos.

24 So at this point, we had had preliminary

Michael Tuteur 4-13-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

38

1 discussions about the possibility of representation.
2 Hence, I believed that there was already confidential
3 information that had been provided to me and so
4 accordingly we had to examine the question about
5 whether that preliminary pre-representation status
6 affected Epstein Becker's potential representation of
7 ATG. So that's what I meant by that.

8 Q. And there is in, I believe it was Exhibit 2 -- is
9 that Exhibit 2?

10 A. Yes.

11 Q. Maybe Exhibit 1. In Exhibit 1, there was a
12 reference to joint defense communication.

13 Was Epstein, Becker and Green a party to any joint
14 defense agreement with respect to the MMT shareholder
15 litigation prior to December 1, 1998?

16 ATTY. FLEISCHER: Objection. Foundation.

17 THE WITNESS: I am unaware of -- I do not believe
18 Epstein Becker was a party to a joint defense agreement
19 during the Molten Metal shareholder litigation before
20 December 1, 1998.

21 Q. When you referred to confidential information that
22 had been provided in these preliminary discussions
23 about the possibility, were you referring to the
24 documents that were provided to you by Ms. Rendon that

Michael Tuteur 4-13-2006
Robert Hanfling v. Epstein, Becker & Green, et. al.

39

1 had been marked as Tuteur Exhibits 1 and 2?

2 A. Yes.

3 ATTY. COOKE: I have no further questions.

4

5 (Deposition concluded at 2:09 p.m.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ROBERT I. HANFLING, CHAPTER 11) Case No. 05-10077-RGS
TRUSTEE FOR ATG, INC., AND)
ATG CATALYTICS, L.L.C.,)

Plaintiffs,

vs.

EPSTEIN, BECKER & GREEN, P.C.,)
JOHN PRESTON, CHRISTOPHER)
NAGEL, EUGENE BERMAN, ETHAN)
JACKS, QUANTUM CATALYTICS,)
L.L.C., ABC CORPS 1 THROUGH 5)
AND JOHN DOES 1 THROUGH 5,)

Defendants.

COPY

DEPOSITION OF
KENNETH B. WECKSTEIN
Washington, D.C.
Friday, April 28, 2006

Job No.: 1-77450

Pages 1 through 63

Reported by: John L. Harmonson, RPR

DEPOSITION OF KENNETH B. WECKSTEIN
CONDUCTED ON FRIDAY, APRIL 28, 2006

54

1 represent ATG so that Epstein Becker could go and
2 look at documents that were then with the trustee.

3 Gabor then went and spoke with Nagel, or
4 he told me he spoke with Nagel, and he told me that
5 that was acceptable, that we could go ahead with the
6 representation.

7 I then called Bill Hewitt -- that is the
8 document that is Exhibit 11 -- and indicated that a
9 number of things -- he made the first two comments
10 about just being interested in the wet waste
11 services and he was not interested in certain other
12 assets. And I advised him that there was another
13 potential conflict beyond that of the Molten Metal
14 individuals which he previously had agreed was not a
15 conflict and would be okay, and that was the
16 Nagel/Preston relationship. He indicated that that
17 was fine, he wanted to move on, and he asked who he
18 would be meeting with in Boston regarding pursuing
19 this matter.

20 MS. BAGGER: I have no further questions.

21 EXAMINATION BY MR. FLEISCHER:

22 Q. With respect to the waiver of a potential

CONFIDENTIAL

JP1-Bill
10/2/98

Not interested in
waste water services

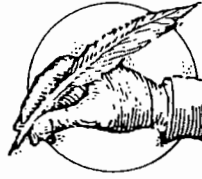
not interested in
Foster - noiss
patents (other than
waste water)

Advised of potential conflict

Who would he meet with
in Boston re contracts.

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Transcript of the Testimony of:

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April 18, 2006

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Robert I. Hanfling v. Epstein, Becker & Green, P.C., et al.

22

1 A. No.

2 Q. And in 2000?

3 A. No.

4 Q. Were you -- are you aware of -- did you become
5 aware prior to December 1st of 1998 that MMT had been
6 involved in a securities class action litigation?

7 A. No.

8 Q. Did you ever become aware that MMT was involved in
9 a securities class action litigation?

10 A. Yes.

11 Q. To the best of your recollection, when did you
12 first become aware of that?

13 A. I can't recall, but I believe it was sometime in
14 the -- in January or February of 1999.

15 Q. Do you know who Carole Schwartz Rendon is?

16 A. I do.

17 Q. Do you personally know her?

18 A. I do.

19 Q. When did you first meet Carole Schwartz Rendon?

20 A. I honestly don't recall. I interviewed her as a
21 part of the possibility that she would join us as a
22 lawyer and I don't remember the dates on that. I don't
23 remember the years, but that's when I first met her.

24 Q. Would that have been prior to 1998?

Jarvis Kellogg 4-18-2006
Robert I. Hanfling v. Epstein, Becker & Green, P.C., et al.

23

1 A. I think it probably was. It would have been, yes.

2 Q. Did you work with her at Epstein Becker?

3 A. No.

4 Q. Did you work at the same office where she worked?

5 A. You mean the same -- did she work at the Boston
6 office?

7 Q. Yes.

8 A. Yes.

9 Q. Did you become aware that she had represented
10 various individuals in connection with certain
11 investigations, federal government investigations of
12 Molten Metal Technology, Inc.?

13 A. I would say yes, but my awareness is very dim. In
14 other words, I don't have any -- I seem to recall that
15 she was involved in some way or another, but I have no
16 memory of what it was about.

17 Q. Do you recall when you may have first became
18 aware?

19 A. I believe it was -- I believe it was at the time
20 that John Preston became a client of the firm.

21 Q. When was that?

22 A. I think that was in January or maybe February of
23 1999.

24 Q. Did you have any discussions with Mr. Preston